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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

MARCIANO PLATA, et al.,

Plaintiffs,

v.

ARNOLD SCHWARZENEGGER, et al.,

Defendants.

Case No. C01-1351 TEH

RECEIVER'S REPLY TO PLAINTIFFS' RESPONSE TO PLAN OF ACTION

Date: August 27, 2007
Time: 10:00 a.m.
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Receiver Robert Sillen ("Receiver") submits this Reply to Plaintiffs' Response to the Receiver's Plan of Action ("Pltfs. Resp."), filed on June 29, 2007.

PRELIMINARY STATEMENT

In their response to the Plan of Action ("POA") plaintiffs and their counsel have accused the Receiver of bad faith, of acting secretly and of deliberately disregarding this Court's orders. They conclude this assault on the Receiver by insisting that the Court appoint "experts" to oversee the Receiver's work. In effect, they demand that the Receiver be put into receivership.[1]

The most noteworthy aspect of plaintiffs' response, however, is what is missing. Nowhere have plaintiffs' counsel challenged the conceptual underpinnings of the POA or any of the many goals and objectives the Receiver has articulated in it. Plaintiffs' counsel have not submitted any evidence from any expert that the POA is unworkable, unreasonable or otherwise on the wrong track as a planning tool for the transformation of the medical delivery system in the prisons. Instead, plaintiffs' counsel rest their entire challenge to the POA on *their* belief that the Receiver has had plenty of time to produce an exquisitely detailed plan, with every individual step precisely described, including when those steps will be commenced and completed and how they will be measured. Since the POA does not conform to plaintiffs' counsel's conception of a proper plan, they accuse the Receiver of consciously ignoring this Court's orders.

As unwarranted as such accusations are, and as tempting as it is to respond angrily to them, the Receiver intends to turn down the heat in this Reply. Suffice it to say that ad hominem attacks do not substitute for analysis and plaintiffs' counsel's beliefs and assumptions do not substitute for evidence. That the Receiver responds in tones more measured than those adopted by plaintiffs' counsel should not be mistaken for any lack of conviction that the POA represents the most promising path out of the wilderness that is the prison medical care system.[2]

As the evidence submitted herewith demonstrates, the POA was developed, not by lawyers working from a "how-to" manual, but by medical professionals with many years of

[1] It goes almost without saying that this extraordinary request, even if had merit (and it does not), is not properly before the Court, having been dropped in at the conclusion of plaintiffs' opposition.

[2] It is unfortunate that plaintiffs' counsel have apparently decided that the Receiver, rather than the ongoing crisis in the prison medical care system, is the enemy.

hands-on experience in improving health care delivery in a host of settings. *See* Declarations of Terry Hill, M.D. ("Hill Decl.") and Betsy Chang Ha, R.N. ("Ha Decl."), filed herewith. The POA is based upon and reflects widely-accepted, tested and validated theories and methodologies for organizational transformation in the health care industry. Plaintiffs' counsel do not say otherwise and the silence is deafening.

The Receiver's remedial model is fundamentally different, and far more comprehensive, than the failed remedial model reflected in the prior stipulated orders. The Receiver's approach is to transform, not just reform, the entire medical delivery system so that it complies with, but more important, continues to comply with, constitutional standards. That transformation cannot be achieved until the prison medical system has the necessary infrastructure – personnel, technology, business processes and space – that are precursors to effective change. Imposing artificial timelines and unworkable benchmarks on a system that is not yet constructed or functioning properly is pointless at best and a recipe for failure at worst.

The Receiver honestly and forthrightly acknowledges that the POA is a "living document" that will be refined and clarified as more pieces of this very complex puzzle fall into place. He has not represented the POA as anything other than an "initial roadmap" and expects to supply more specific detail, including timelines and metrics in the revision to be presented in just a few months. As discussed below, the POA reflects the best efforts of the Receiver and his staff at complying with the charge given him within the time allotted and more than adequately describes his overall approach to transforming the prison medical system.

ARGUMENT

A. The Ongoing Crisis In The Prison Medical System Has Meant That The POA Has Taken Longer To Develop Than Originally Anticipated.

A near constant refrain in plaintiffs' counsel's response is that the Receiver has been in operation for "more than a year;" plenty of time, they say, to produce the kind of detailed plan they believe is required. The Court is undoubtedly aware that the Receiver has been in true operation for substantially less than a year. The Receivership began with barely a handful of employees and the first months of the Receivership were consumed largely with building an

organization, obtaining space, hiring employees and beginning the very long learning curve necessary to get a handle on the complexities and problems in the prison medical care system.

It became apparent early on that the mountain that the Receiver and his staff would have to climb is significantly higher, steeper and rockier than anyone knew. The Receiver has said on more than one occasion, including when he requested his extension of time to file the POA, that the flaws, fissures and failings in the sprawling and chaotic mess that is the prison medical care system are substantially deeper, more fundamental and more intractable than anyone predicted when the Receiver took on his task. *See generally* Receiver's Motion For An Extension Of Time To File Plan of Action, etc., filed herein on November 13, 2007, pp. 2-9; Receiver's Report Re Overcrowding, filed on May 15, 2007, p. 2.

The Receiver's challenge would be daunting even if he were starting afresh, without any baggage from the past. But he does not have that luxury. As the Report accompanying the POA states, "The Receiver's efforts did not begin on a level playing field." Report Re POA, p. 3. The system (such as it is) already exists and is functioning (even if badly); the Receiver must simultaneously tear down the old system and address short term crises, even as he is attempting to build the new system. Hill Decl., ¶ 17; Ha Decl., ¶ 17. That will inevitably mean that roadblocks to reform will continue to present themselves.

In addition, no one, least of all plaintiffs' counsel, disputes that the very serious overcrowding in California's prisons is making the Receiver's job even more difficult. No matter how well-planned the Receiver's remedial efforts may be, they are more difficult to design and implement given the size of the current prison population, and the attendant lack of staffing and clinical space to accommodate that population. Overcrowding Report, pp. 24-31.

The foregoing is not offered as an excuse, but rather as context for evaluating the development of the POA. It took decades for the prison medical system to arrive at the state that it is in; it cannot be remedied over night. If the problems are deeper and broader than anticipated, then implementing solutions will take longer than anticipated and will require the willingness to discard approaches that, on further reflection, did not, cannot or will not work. After years of wasted effort before the Receiver was appointed, plaintiffs' counsel are understandably frustrated

that the Receiver cannot snap his fingers and solve deeply entrenched problems according to a precise schedule. But that frustration could be more productively channeled into giving the Receiver the benefit of the doubt and attempting to work with him to achieve what everyone agrees is the goal: a properly functioning, constitutional prison medical care system.[3]

B. The Receiver's Remedial Model, As Reflected In The POA, Is Fundamentally Different From The Failed Remedial Model Set Forth In The Stipulated Orders And Is Based On Widely-Accepted, Successful Methodologies For Health Care Planning.

Plaintiffs' counsel purport to tell the Court what is required for a "competent plan" (Pltfs' Resp., pp. 3-4), but provide no evidence whatsoever that the *POA* is insufficient. Instead, plaintiffs' counsel rely exclusively on a prior declaration by Dr. Spivey which they submitted *five-and-a-half months before* the Receiver filed the POA. *Id.* Dr. Spivey is undoubtedly entitled to his abstract opinion, but since his declaration does not, and could not, say anything at all about the POA itself, it cannot serve as the basis for rejection of the plan.

In marked contrast, the POA is grounded in an understanding of what is required to transform a dysfunctional organization and in appreciation for just how dysfunctional the prison medical system is. Of equal importance, the POA was crafted by professionals, well-versed in the theory of health care planning, who bring to bear many years of experience in the real world actually improving the quality of health care delivery.

1. The Receiver must tackle a significantly wider and more complicated set of issues than those addressed under the prior remedial orders.

The prior remedial process assumed that specific health care-related problems could be remedied without regard to the underlying structural weaknesses in the State system. Those weaknesses extend into every sphere: personnel, training, technology, organizational structure,

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[3] If complete development and implementation of the POA will play out over a longer time horizon, no one should forget the very significant changes that the Receiver has already wrought in the system, all of which are part and parcel of the POA itself:

> The Receiver has . . . implemented a number of priority remedial programs including raising clinical salaries, establishing expedited clinical hiring processes, restructuring the CDCR specialty provider, registry, and hospital contract units through an IT driven pilot program.

Report, p. 6. These are but a few examples of the many initiatives the Receiver has launched. A more complete list can be found in the Declaration of John Hagar, filed July 23, 2007, in support of the Receiver's opposition to plaintiffs' motion regarding the April 4, 2003 stipulated order.

organizational processes, contracting and construction, just to name a few. As a result, "[a]ttempts to implement [the stipulated] standards in isolation have proven to be ineffective . . . because nearly every area within the CDCR, *e.g.*, procurement, custody support, population, and personnel, affects and potentially hinders each process of health care delivery." POA, p. 16.

> The original remedial stipulations contained no provisions for the State infrastructure necessary to implement the stipulations themselves. For example, while *Plata* called for the hiring of hundreds of doctors and nurses[,] the salaries, recruitment programs, hiring programs, training programs, and retention programs necessary to bring quality clinicians into the prisons were neither contemplated nor developed.

Report re POA, p. 4:10-14.[4] Lasting change in the medical care delivery system will require a coordinated response that results in significant change in all areas that impact prison medical care. Accordingly, "the CDCR requires an entirely new infrastructure of medical delivery *before* necessary programs of clinical remediation can be effectively implemented in a sustainable manner." Overcrowding Report, p. 7:17-18 (emphasis added). Since the Receiver must construct the necessary foundation and infrastructure before the medical care system can function properly, the scope of his remedial measures is broader than those previously attempted or anticipated.

In addition to focusing narrowly on specific issues, the prior stipulations proceeded from a top-down, central planning model of development and implementation. The "remedial" plans were developed in the abstract and then were to be applied "in a predetermined, *en bloc* fashion rather than on a pilot basis." POA, p. 16. Such a model requires an unrealistic amount of foresight, since it is a "one size fits all" approach that presupposes that all problems in implementation can be anticipated and planned for in advance. By contrast, the POA and the Receiver's approach to remedying the system is both bottom up as well as top down, and is grounded in pilot programs, undertaken on a limited basis. *See* Hill Decl., ¶¶ 24-26; Ha Decl., ¶ 21. Specific programs and procedures can be attempted, tested, modified, even discarded, with

[4] In a related vein, the original stipulations did not provide for the technology, physical plant, equipment and personnel necessary to implement the remedial plans. Moreover, "the original remedial processes . . . worked to establish 'silos' of health [care] delivery in California's prisons, driving up the overall cost of care and creating unnecessary tensions between the medical, mental health, and dental disciplines." *Id.*, pp. 4-5.

minimum cost before implementation is undertaken system-wide. Timelines and metrics for the various aspects of the remedial program will, in part, be based on the information gathered and lessons learned during the pilot programs. Hill Decl., ¶¶ 24, 26; Ha Decl., ¶ 21; *e.g.*, POA, p. 43.

2. The Receiver's remedial model is consistent with widely-accepted methodologies for organizational transformation in the health care industry.

The Receiver did not simply pluck the POA out of thin air. Instead, it reflects the best and most current thinking about organizational transformation in the health care industry. The Receiver relied primarily on his Chief Medical Officer, Terry Hill, M.D. and Chief Nursing Executive, Betsy Chang Ha, R.N., to develop the clinical model and the remedial steps to be taken. Dr. Hill and Ms. Ha each have extensive professional experience developing and implementing quality improvement programs in health care organizations in a variety of settings. They called upon their personal professional experience and expertise, as well as upon widely-accepted and, most importantly, *proven* methodologies for organizational transformation that have been distilled and articulated by such organizations as the Institute of Medicine ("IOM") and the Baldrige National Quality Program ("BNQP"). Hill Decl., ¶¶ 9-12 ; Ha Decl., ¶¶ 13-14; POA, pp. 11-12. As Dr. Hill states, "[i]n developing the POA, we felt that it was important that its goals and strategies be grounded in accepted health care planning concepts and that these goals and strategies be evidence-based to the greatest extent possible." Hill Decl., ¶ 8.

What the Receiver's team determined is that, because the problems in the CDCR medical care system are so fundamental, building the organizational foundation will be necessary before complete implementation of the transformational strategies reflected in the IOM and BNQP models can be accomplished. Hill Decl., ¶¶ 12-14; Ha Decl., ¶¶ 15-20. To succeed, an organizational strategic plan must have at least three prerequisites:

> (1) adequate organizational structure; (2) adequate organizational processes; and, (3) appropriate measurement of outcomes. Each of these elements must be present for a strategic plan to produce the desired results. Therefore, without the first two elements, it is neither feasible nor efficacious to undertake measurement of outcomes. Attempts at measurement of outcomes in an organization with an inadequate structure and/or inadequate processes will produce poor or unreliable results at best, and will reproduce prior failures at worst.

Ha Decl., ¶ 15.

CDCR still lacks the necessary organizational infrastructure and business processes for a strategic plan to succeed.

> The Receiver must begin, therefore, by developing the precursors for positive change in an organization that has suffered from decades of abject neglect. This statewide, complex organization with dozens of sites and multiple levels of care completely lacks elements that even a small community hospital would take for granted, such as a case management program, or a continuing medical education program, or ethics committee, or identifiable leadership in radiology, laboratory services, physical therapy or occupational therapy. The chronic neglect of nursing and pharmacy leadership has been noted elsewhere. The physician leadership has been preoccupied by the time-consuming challenge of weeding out incompetent or irresponsible physicians.

Hill Decl., ¶ 12.

In light of these overwhelming systemic deficits, much of the POA, as well as the Receiver's activities over the last year, have been devoted to addressing these foundational needs. For example, a considerable amount of effort has been directed at implementing appropriate information technology. Such technology is essential for any meaningful organizational change. Similarly, appropriate staffing is critical if change is to take root and hold. The POA in its current form focuses on building the proper leadership in the organization, and on identifying, hiring and placing the right people in the right places in the CDCR medical care system. Hill Decl.,¶¶ 13-15; Ha Decl., ¶¶ 19-20. Without the right people the other remedial measures cannot be achieved. In fact,

> [i]n important respects, the POA is designed to be a signal to health care professionals that the CDCR is both serious and realistic about organizational transformation. The POA reflects a model of improvement that health care professionals understand and respect. It is, therefore, intended as a recruiting tool for good leadership and, in fact, is already beginning to pay off in this respect. I have recently been contacted by a number of highly qualified individuals who became serious about the possibility of working for the organization after reading the POA. The POA is a signal that the new CDCR will engage the creativity of staff at every level and indeed must do so in order to achieve reliable outcomes. [Citation omitted.] If the organization has adequately trained and motivated staff, the other transformational strategies will be much easier to accomplish.

Hill Decl, ¶ 13. Once the foundational infrastructure is in place, then the organization will be better positioned to undertake the overall strategies embodied in the POA.

C. Appropriate Timelines And Metrics Will Be Provided As The POA Is Refined.

1. Including timelines and metrics in the POA at this juncture is premature.

The scope of the problems faced by the Receiver, together with the remedial approach he is undertaking, have implications for the level of detail that can realistically be expected at this stage of the process. "As of today, accurate metrics are not possible due to a shortage of competent personnel including clinicians, no information technology, no prison connectivity, and no accurate manual systems of control." Report Re POA, p. 8:5-7. It is not too much to say that "the Receiver is still building the building blocks, *i.e.,* the prerequisites, necessary to construct a full and successful strategic plan." Ha Decl., ¶ 22. Efforts to measure "outcomes in an organization with an inadequate structure and/or inadequate processes will produce poor or unreliable results at best, and will reproduce prior failures at worst." Ha Decl.,¶ 15. For example, a major failing in the *Plata* monitoring standards under the prior remedial process:

> was that they required gathering data without adequate systems for data input, retrieval and verifiable analysis in the first instance, without sufficiently trained staff with an understanding of the goals of the organization, and without any coherent articulation of why the data is being gathered or for what the data will be used. Moreover, the medical care leadership was instructed to gather information without any well-articulated sense of which information was important or which information should be gathered first. . . .
>
> Without appropriate information technologies for data input, retrieval and analysis, and without adequately trained and motivated staff, collecting data borders on an exercise in futility.

Hill Decl., ¶¶ 21-22, 30-31. Put another way, measurement for the sake of measurement will not advance the remedial process. As Dr. Hill colorfully puts it, "you can't fatten a cow by weighing it." *Id.*, ¶ 24.

There is danger of creating unrealistic expectations by too quickly including timelines and other yardsticks in circumstances like those faced by the Receiver. Dr. Hill states:

> We could have included timelines in the POA at this point, but they would have been artificial and of doubtful accuracy or validity. The Receiver is still in the start-up phase of the various remedial projects under way. . . . Had we included gratuitous timelines within the POA, we would have been setting up everyone – the Court, the parties, the Receiver's staff – for disappointment when those timelines inevitably turned out to be wrong. In the process, the Receiver, Court, and new CDCR leadership would risk losing credibility.

Id., ¶ 16. Indeed, Ms. Ha has gone so far to opine that "it would be inappropriate to attempt to

provide complete timelines, details and metrics in the . . . POA, until adequate infrastructure and business processes have been developed and more fully implemented in the system. Otherwise, we would be risking failure and disappointment if those artificial benchmarks are not achieved." Ha Decl., ¶ 22. The Receiver's team is proceeding cautiously and is "sensitive . . . to not wanting to 'over promise' when and what results will be achieved at this still relatively early stage." *Id.*, ¶ 23. Moreover, CDCR must undergo a change in "culture" if the remedial plan is to ensure constitutionally-adequate medical care, and "[c]hanging the culture in an organization is not something that can easily be accomplished according to artificial time lines." *Id.*, ¶18. *See also* Hill Decl., ¶ 30. Standards must be developed, to be sure. But "what matters is that health care staff trust that standards derive from the best available medical evidence and professional judgment." Hill Decl., ¶ 31. The Receiver and his staff are still in the process of building that trust throughout the organization.

The difficulty in articulating timelines and metrics at this stage is not just a matter of inadequate infrastructure, business processes and culture within CDCR itself. The Receiver must contend with the larger State system of which CDCR is but a part. "It is difficult enough to create an organization anew; it is many times more difficult in the situation faced by the Receiver where he not only must create a functioning organization, he must first rip out the dysfunctional components and negotiate renewal within the constraints of the state bureaucracy." Hill Decl., ¶17; *see also* Ha Decl., ¶ 24. A single example – an example, ironically enough, also cited by plaintiffs' counsel – demonstrates how those bureaucratic challenges make establishing timelines and providing other details so problematic at this juncture.

As the Court is aware, the Receiver has proposed to create and fill 250 Receiver Career Executive Assignment ("RCEA") positions. The POA specifically refers to these positions as part of the Receiver's strategy. POA, Objective A.7, p. 22. Plaintiffs' counsel fault the Receiver for not including in the POA "the steps necessary to create and fill" the positions or information pertaining to the current budget and hiring plan for these positions. Pltfs. Resp., p. 7.[5] The Receiver presumably could have stated in the POA that he intended to have some specified

[5] This Court has itself rejected most of counsel's criticisms in its Order, dated July 3, 2007, at p. 10.

number of the proposed 250 RCEAs hired by a date certain and that they would be working in specified prisons doing specified jobs at a specified rate of pay. But none of that detail would have changed the fact that the Receiver has yet to obtain approval for even one such position and that doing so will require more work with the State bureaucracy, and thus, more time than the Receiver anticipated. In circumstances as complex and dysfunctional as the prison medical system there will inevitably be competing considerations and interests that can make any detail provided by the Receiver – no matter how carefully considered or calibrated – simply irrelevant. *See* Hill Decl., ¶¶ 18-20. For, notwithstanding the Receiver's authority, and notwithstanding his commitment to remedying the system, the Receiver is not a czar with absolute power to impose change.

Finally, and perhaps most important, questions of priorities and allocation of resources are implicated in the discussion about time lines and metrics. Measurement of outcomes and benchmarks for performance are important, but patients' lives are hanging in the balance in the meantime. The Receiver has made the judgment that undue emphasis on "measurement" at this point will divert precious resources from the core mission of immediately improving medical care delivery to inmates. Dr. Hill notes that, "[t]he Receiver has chosen *not* to implement a more elaborate electronic scheduling and tracking system, even though the tracking system would generate desirable data reports, because the latter would take significantly longer to implement. . . . *Our primary focus right now must be on delivering care to the patients, not on extracting detailed measures of that care.*" Hill Decl., ¶ 24 (emphasis in original). And it makes little sense to expend staff time and energy in the measurement of a system that everyone agrees remains broken. *Id.*, ¶ 22.

Plaintiffs' counsel's insistence that the POA include "details," "time lines" and "metrics" *at this stage* reflects a fundamental misunderstanding of the Receiver's remedial model and a failure to appreciate the complexities involved, while demonstrating that they remain wedded to the failed top-down, central planning methodology embodied in the stipulated orders.

2. The Receiver is developing, and will provide, more complete timelines and metrics in subsequent iterations of the POA.

Plaintiffs' counsel seek to create the misleading impression that the Receiver has tried to hide the fact that the POA is a work in progress. To the contrary, the Receiver states at the very outset of the POA that it is "an initial roadmap" and "a living document, subject to revision and additional detail as it is developed. *At this point in time, it is not possible to set forth a time line for all future remedial actions*, nor is it possible to describe all future budgetary impacts of the Plan. This information, however, will be presented in future iterations of the Plan as various elements of the Plan are effectuated." POA, p. 3 (emphasis added). *See also* Hill Decl, ¶¶ 18-20, 31; Ha Decl., ¶ 24. Far from being a "deliberate failure" to comply with the Court's Order or demonstrating "resistance to accountability and transparency" or putting "at risk the remedial efforts in this case," as plaintiffs contend (Pltfs. Resp., p. 13), the POA forthrightly acknowledges that a proposed timeline for all future remedial efforts has yet to be developed. POA, p. 3.[6]

The Receiver and his team understand that the Court's Order requires timelines and metrics in the POA and agrees with plaintiffs' counsel that the POA will not be entirely complete until timelines and metrics are developed and included. POA, pp. 3, 43-49; Hill Decl., ¶¶ 23-29; Ha Decl., ¶¶ 16, 24-25.

> We understand . . . that the POA is not complete and is at a higher level of abstraction than it will be eventually. But plaintiffs' counsel are asking for concrete detail when, as the Receiver emphasized, the POA is a "living document." POA, p. 3. Those were not just words. They were intended to reflect that the remedial process must develop and grow more organically at this juncture. . . . As we learn more, then the kinds of time lines and metrics that appropriately belong in a strategic plan can be added to the POA. We intend to submit an updated POA in November that will begin to fill in those details.

Ha Decl., ¶ 24.

[6] Had the Receiver anticipated the unwarranted protest from plaintiffs' counsel, he might simply have requested an additional extension of time to present his initial version of the POA. Instead, the Receiver and his staff worked extremely diligently to present a meaningful plan in keeping with the Court Order. That plaintiffs' counsel are nevertheless unsatisfied thus falls into the category of "no good deed goes unpunished."

To the extent feasible, therefore, the Receiver has tried to provide the Court with a sense of the tasks he hopes to accomplish or initiate over the medium term. He has specifically set forth in the Plan roughly 16 separate projects and initiatives that will be his principal priorities over the next 18-24 months. *Id.*, pp. 41-43; *see also* Fifth Quarterly Report, pp. 7-8. Timelines will be developed for each of those particular projects, and in fact are already being or have been developed. POA, p. 43; Ha Decl., ¶ 21. And, as indicated above, timelines will be among the updates to the POA anticipated for November 2007. *Id.*, p. 3.

With respect to metrics, the Receiver has provided six pages of discussion in the POA on the development of metrics and what they will measure. Testing the quality of performance should be evidence-based and grounded in measurable outcomes. Hill Decl., ¶ 23; Ha Decl., ¶ 20. As discussed above, the key to developing meaningful metrics is having the appropriate infrastructure in place to facilitate adequate data gathering and analysis. Without proper infrastructure – personnel and information technology in particular – performance cannot meaningfully be measured. Ha Decl., ¶¶ 15, 20; Hill Decl., ¶¶ 21-22. *CDCR either lacks those systems or they are not fully operational.* POA, pp. 45-46; Hill Decl., ¶¶ 21-22.

The Receiver acknowledges that "it is imperative that vital information be provided to the Court, counsel, and the Receivership itself. Therefore, an administrative structure that will provide accurate systemic metrics should be established as soon as possible." Report Re POA, p. 8:7-10. Fortunately, in the last several years, an entire body of information has been published in the wider health care industry that will assist the Receiver in constructing his own system of quality measurement. For example, the National Quality Forum has begun to endorse comprehensive performance measure sets for hospitals, ambulatory care, and other settings and the IOM published its measurement volume in 2006. These recently published measurement criteria and protocols for quality care, all of which have been appropriately validated, can be utilized by the Receiver to develop metrics appropriate to the State prisons. Hill Decl., ¶ 23.[7]

[7] At the same time, accepted standards for measuring improvement in and access to correctional health do not yet exist. The Receiver and his staff are thus on the cutting edge. Their work may contribute to setting such national standards. Hill Decl., ¶ 23; Ha Decl., ¶ 23.

To build an appropriate quality measurement system, the Receiver is developing an Office of Evaluation, Measurement and Compliance ("OEMC") that will be operational prior to the filing of the POA update in November 2007.

The OEMC will develop the following measuring processes:

> (1) a system to objectively measure the basics of the *Plata* remedial plan compliance at no less than six pilot prisons;
>
> (2) an accurate and objective system of mortality reviews; [and]
>
> (3) a pilot program for institutional inspections and *Plata* remedial compliance developed with California's Office of the Inspector General.

Id., p. 8:17-21. *See also* Hill Decl., ¶ 24.

In the meantime, the Receiver and his staff have begun using pilot projects at various prisons to identify roadblocks to accurate measurement, to train staff in how and what to measure and to test out approaches and methodologies before measurement systems are utilized statewide. Hill Decl., ¶¶ 24-26; Ha Decl, ¶ 21. These pilot efforts "will yield written templates and processes, together with a new information technology infrastructure element, all of which can then be disseminated in controlled, step-wise fashion throughout the state. Each domain of interest within the *Plata* standards will require . . . painstaking and laborious redesign efforts." Hill Decl., ¶ 24. In addition to yielding valuable information, the pilot efforts are simultaneously beginning to build enthusiasm among clinical staff that important changes in the medical care delivery system are underway. *Id.*, ¶ 28.[8]

D. Plaintiffs' Request For "Experts" To Oversee The Receiver Is Procedurally Defective And Substantively Without Merit.

Plaintiffs' counsel ask this Court to put the Receiver into receivership. That is the practical effect of their request for "experts" to direct and oversee the Receiver's further development of the POA. Under normal circumstances, this request would not merit any response since it has not been made by way of noticed motion. Civil L.R. 7-1(a). Nevertheless, the Receiver addresses it briefly.

[8] Since the degree of compliance achieved in the prisons will go a long way to determining how effective the Receiver has been, the processes to be developed by OEMC underscore that, contrary to plaintiffs' claim, the Receiver is vitally interested in measuring his own performance.

First, there is no evidentiary basis whatsoever for counsel's request. As the lengthy discussion above demonstrates, the only evidence in this record is that the POA has been developed by qualified experts according to rigorous and well-accepted methodologies. The POA will then be refined and expanded in the coming months.

Second, to put it bluntly, plaintiffs' counsel want to clip the Receiver's wings because he is vigorously engaged in doing the job of a receiver, *i.e.*, exercising his best, independent judgment on behalf of, and subject to the direction of, the Court. *Cf. SEC v. Elliott*, 953 F.2d 1560, 1577 (11th Cir. 1992) (Receiver is officer, and acts under direction, of court which "must independently approve the Receiver's legal and factual findings"). For a number of years, plaintiffs' counsel occupied a central role in the remedial efforts in the prison medical care system. They are to be commended for their efforts. But the remedial process in which they participated *failed* and that is why this Court appointed the Receiver. Plaintiffs' counsel must necessarily play a different role in the remedial process now that the Receiver is in place. Granting plaintiffs' counsel's extraordinary request, however, would say to the defendants and the public, no less than to the Receiver, that he cannot be trusted to do his job in good faith, subject to the oversight and direction of this Court. Rather, the message would be loud and clear that plaintiffs' counsel control the remedial process. That is not, and should not be, their role.

Plaintiffs' counsel will continue to serve an important function in the remedial process by advocating vigorously on behalf of their clients. The Receiver looks forward to hearing their perspective on the important issues at stake and to working *with* them to produce a constitutionally adequate health care system. What the Receiver should not and will not do, however, is work *for* them. The Court must deny plaintiffs' request.[9]

[9] Plaintiffs' counsel's startling request for "experts" to monitor the Receiver suggests, even if unintentionally, some lack of faith on their part in this Court's ability to oversee the Receiver.

CONCLUSION

For all the foregoing reasons, the Court should approve the POA and reject plaintiffs' challenges to it.

Dated: July 30, 2007

FUTTERMAN & DUPREE LLP

By: /s/
Jamie L. Dupree
Attorneys for Receiver Robert Sillen

CERTIFICATE OF SERVICE

The undersigned hereby certifies as follows:

I am an employee of the law firm of Futterman & Dupree LLP, 160 Sansome Street, 17th Floor, San Francisco, CA 94104. I am over the age of 18 and not a party to the within action.

I am readily familiar with the business practice of Futterman & Dupree, LLP for the collection and processing of correspondence.

On July 30, 2007, I served a copy of the following document(s):

RECEIVER'S REPLY TO PLAINTIFFS' RESPONSE TO PLAN OF ACTION

by placing true copies thereof enclosed in sealed envelopes, for collection and service pursuant to the ordinary business practice of this office in the manner and/or manners described below to each of the parties herein and addressed as follows:

___ BY HAND DELIVERY: I caused such envelope(s) to be served by hand to the address(es) designated below.

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Dated: July 30, 2007

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